IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 421 of 1999

with

CRIMINAL APPEAL No 580 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HARUN MAHMADBHAI MEMON

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 421 of 1999
MS D.R KACHHAVAH for the appellant
Mr.K.P. Rawal, APP for Respondent No. 1

2. Criminal AppealNo 580 of 1999
Mr.K.P. Rawal, APP for the appellant
Ms.D.R. Kachhavah for the respondent

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE R.P.DHOLAKIA

Date of decision: 15/02/2001

COMMON ORAL JUDGMENT: (Per : MR.JUSTICE M.H.KADRI)

1. Appellant, by filing Criminal Appeal No.421 of 1999, under Section 374(2) of the Code of Criminal Procedure, has challenged the judgment and order dated March 31, 199, passed by the learned Special Judge, Bhavnagar, in Special N.D.P.S. Case No.4 of 1996, by which judgment, the appellant was convicted for the offences under Section 8 read with 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) and was sentenced to undergo R.I. for three years and fine of Rs.25,000/-, in default, S.I. for two years.

2. State of Gujarat has filed Criminal Appeal No.580 of 1999 under Section 377 of the Code of Criminal Procedure for enhancement of the aforesaid sentence imposed by the learned Special Judge, Bhavnagar, in Special N.D.P.S. Case No.4 of 1996. As common question of facts and law arise for our consideration, we propose to dispose of both the appeals by this common order.

3. The prosecution case, in brief, is as under: P.W.2, PSI, K.N. Patel, Task Force Branch, Bhavnagar, along with other police personnel, were patrolling near the S.T. Police Chowki, Bhavnagar, on May 23, 1992. They received an information that a person, named, Harun Mahmadbhai Memon (appellant), resident of Sihor, was likely to pass through that road with a narcotic substance, namely, ganja, in his possession. Accordingly, P.W.2, K.N. Patel, informed the District Superintendent of Police, Bhavnagar, about the information received and called two panchas, namely, P.W.1, Rafikbhai Husenbhai Mirza and P.W.3, Mahipatsinh Ganubha Jala. A preliminary panchanama was drawn and the patrolling party along with two panchas had gone near S.T. Police Chowki along with raiding equipments, namely, seal and other materials. At about 21.30 hrs. one person was coming towards Shishuvihar Circle having one suitcase in his hand. The said person was stopped and, on being interrogated, he disclosed his name as Harun Mahmadbhai Malkani Memon (appellant). P.W.2 asked him whether he wanted to be searched in presence of a Gazetted Officer or a Magistrate as per the requirement of Section 50 of the NDPS Act. When the suitcase carried

by the appellant was searched, a narcotic substance, namely, ganja, was found in two plastic bags. One trader, namely, Dolatmal, was called along with a weighing-scale. The narcotic substance was weighed in presence of the panchas and it was found that the quantity of the said substance was 1 kg 500 grams. The raiding party took two samples of 100 gram each from two plastic bags. The said samples were sealed and the slip bearing signatures of panchas and P.W.2 was affixed on it. Both the samples were, thereafter, sealed and other narcotic substance was seized under a panchanama. P.W.2 lodged a complaint at Bhavnagar "C" Division Police Station, which was registered as C.R. No.216 of 1995. The muddamal substance was sent to Forensic Science Laboratory for investigation. The report of the FSL indicated that it was a narcotic substance as defined under the NDPS Act. After completing the investigation, a chargesheet came to be filed against the appellant in the Court of learned Judicial Magistrate, First Class, Bhavnagar, which was registered as Criminal Case No.4117 of 1995. The learned Judicial Magistrate, First Class, Bhavnagar, committed the case to the Special Court, as the Special Court had its exclusive jurisdiction to try the offences under the NDPS Act. Accordingly, the case was transferred to the Special Court, Bhavnagar, where it came to be numbered as Special Case No.4 of 1996.

3. Charge Exh.3 was framed against the appellant which was read over and explained to him. The appellant pleaded not guilty and claimed to be tried. To prove the charges framed against the appellant, the prosecution examined (1) P.W.1, Rafikbhai Husenbhai Mirza, Exh.8, (2) P.W.2, Kanubhai Narottamdas Patel, PSI, complainant, Exh.10, (3) P.W.3, Mahipatsinh Gajubha Jala, Exh.16, (4) P.W.4, Dolatbhai Kartalbhai, Exh.17, (5) P.W.5, Balmukundbhai D. Pandya, Exh.18, (6) P.W.6, Batuksinh Dipsinh, Exh.21, (7) P.W.7, Dineshchandra Popatlal, Exh.23, and (8) P.W.8, Ishwarbhai D. Vaniya, Exh.25. The prosecution also produced documentary evidence such as panchanama Exh.9, complaint lodged by the PSI at Exh.12, report of FSL at Exh.22, etc. to prove the charge against the appellant. On completion of evidence led by the prosecution, the learned Special Judge questioned the appellant and his statement came to be recorded under Section 313 of the Code of Criminal Procedure. The defence of the appellant was of denial.

4. The learned Special Judge, after appreciating the oral as well as documentary evidence and the arguments advanced by the learned advocates for the parties, concluded that the raiding officer was an 'empowered

officer' as per the provision of Section 42(1) of the NDPS Act and he had scrupulously followed the mandatory provision of Section 50 of the NDPS Act before carrying out search of the appellant. It was further concluded that the prosecution had established beyond reasonable doubt that the appellant was having conscious possession of a narcotic substance for which he did not possess any pass or permit. The report of the Forensic Science Laboratory proved that the said substance was a narcotic substance as defined under the NDPS Act. On the basis of the aforesaid conclusion, the learned Special judge convicted the appellant for the offences under Section 8 read with Section 20(b)(i) of the NDPS Act and sentenced him to suffer R.I. for three years and fine of Rs.25,000/-, in default, S.I. for two years, which has given rise to filing of this appeal by the appellant.

5. Learned advocate Ms. D.R. Kachhavah for the appellant and learned APP, Mr. K.P. Rawal, have taken us through the entire record and proceedings of the appeals. The learned advocate for the appellant has strenuously urged that, before carrying out search of the appellant, provisions of Section 50 of the NDPS Act were not followed. This submission, in our opinion, deserves to be rejected. Even though the searching officer had found narcotic substance from the bag, which was carried by the appellant, the provisions of Section 50 will not be applicable. In the present case, the narcotic substance was found from the bag. The search of baggage of a person cannot be called a search of a person. If a person is carrying a bag or some other article with him and a narcotic drug or a psychotropic substance is found from it, it cannot be said that it was found from his 'person'. (See: (i) State of Punjab vs. Baldev Singh, reported in AIR 1999 Supreme Court 2378 [-1999 SCC (Cri.1080] (ii) Kalema Tumba vs. State of Maharashtra and another, reported in 1999 Supreme Court Cases (Cri) 1422).

6. The learned advocate for the appellant further submitted that the learned Special Judge had imposed fine of Rs.25,000/- on the appellant, and, in default, had ordered the appellant to undergo S.I. for two years, which is against the provision of Section 30 of the Code of Criminal Procedure. In our opinion, this submission of the learned advocate for the appellant deserves consideration. As per the provision of Section 30(1)(b) of the Code of Criminal Procedure, where imprisonment has been awarded as part of substantive sentence in default for payment of fine, the imprisonment cannot exceed 1/4th of the term of imprisonment imposed by the learned

Special Judge. Therefore, in our opinion, the learned Special Judge was not justified in passing the order that in default of payment of Rs.25,000/- the appellant shall undergo S.I. for two years. Therefore, the order of the learned Special judge directing the appellant to undergo S.I. for two years in default of fine of Rs.25,000/- deserves to be modified to the extent that, if the appellant fails to pay the fine of Rs.25,000/-, in default, he shall undergo S.I. for six months.

7. As a result of foregoing discussion, Criminal Appeal No.421 of 1999 filed by the appellant is partly allowed. The conviction of the appellant under Section 8 read with Section 20(b)(i) of the NDPS Act is confirmed. The substantive sentence of three years R.I. is confirmed. However, the imprisonment imposed on the appellant in default of payment of fine of Rs.25000/- is modified and reduced to the extent that, in case of default of payment of payment of fine of Rs.25,000/- the appellant shall undergo S.I. for six months.

CRIMINAL APPEAL NO.580 OF 1999

8. Learned Additional Public Prosecutor, Mr. K.P. Rawal, while arguing Criminal Appeal No.580 of 1999, has submitted that the sentence imposed on the appellant of three years was grossly inadequate and deserves to be enhanced, because, as per the provision of Section 20(b)(i) of the NDPS Act, the imprisonment prescribed is five years and fine. In our opinion, the submission of learned APP deserves to be rejected. The learned Special Judge, while imposing sentence of R.I. for three years and fine of Rs.25000/- on the appellant, had given cogent and convincing reasons in paragraphs 42 and 43 of the impugned judgment. The maximum sentence provided for the offence under Section 20(b)(i) of the NDPS Act is five years and the learned Special judge, while exercising his discretion, had imposed sentence of R.I. for three years and fine of Rs.25,000/-, which, in our opinion, cannot be called to be inadequate so as to call for any interference. The learned Special Judge, while imposing the sentence, had taken into consideration the facts and circumstances of the case and the fact that the appellant was the only breadwinner of his family and he had no antecedents or that he was not a habitual offender. Therefore, in our opinion, Criminal Appeal No.580 of 1999 filed by the State of Gujarat for enhancement of sentence deserves to be dismissed.

9. As a result of foregoing discussion, Criminal Appeal No.580 of 1999 is dismissed. The muddamal be

destroyed as per the direction given by the learned Special Judge.

February 15, 2001 (M.H. Kadri, J.)

(R.P.Dholakia, J.)
(swamy)